

**Fair Political Practices Commission**  
**Memorandum**

**To:** Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

**From:** John W. Wallace, Assistant General Counsel  
Luisa Menchaca, General Counsel

**Subject:** Approval of 2007 Regulatory Priorities

**Date:** November 27, 2006

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**INTRODUCTION AND BACKGROUND**

This memorandum outlines the staff's recommendations for the Commission's Calendar Year 2007 rulemaking plan implementing the Political Reform Act (the "Act").<sup>1</sup> The rulemaking calendar is attached as **Appendix 1** and is consistent with the Commission's direction from the October Commission meeting and the priorities set out in the staff memorandum in October. Consistent with prior work plans, this plan allows for quarterly review and revisions, and attempts to spread the workload as evenly as possible throughout the year.

We have also recommending the addition of some items and removal of others. The new items are identified with "**NEW.**" Items that have been shifted are identified with "**CHANGE.**" Finally, the items proposed for deletion are indicated with a "**DELETE.**" The items are listed in this memorandum in the order set forth on the attached calendar.

In an effort to assist the Commission in making decisions concerning the proposed regulation calendar, we have added to each project a "**RESOURCE ISSUES**"<sup>2</sup> summary to assist the Commission in deciding on the addition or removal of items. In estimating the resources required for any given project, we assume an average of 60 hours of attorney time per hearing and per regulation.<sup>3</sup> In addition, added to that figure should also be an

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

<sup>2</sup> As we have noted previously, this calendar does not reflect other, nonregulatory duties of the Commission. For example, the staff anticipates significant work on advice letters, litigation, opinions, legislation, and various outreach projects which are part of the regular workload of the agency and involve significant time commitments.

<sup>3</sup> See, September 28, 2005, Memorandum to the Commission "Strategic Plan -- Legal Division" from Luisa Menchaca, General Counsel.

additional 20 hours of attorney time by other attorneys in the division (including supervisorial review), regulation meetings, peer review and associated preparation time. Thus, the total legal division attorney commitment per regulation per meeting would be 80 hours.<sup>4</sup>

Of course, this is a rough estimate. Obviously each project has its own characteristics with respect to the amount of drafting and staff time, number of meetings, and potential for controversy associated with the project. Note that most regulations require at least two Commission hearings, and many require an interested persons' meeting. Moreover, these figures do not reflect the additional burden on representatives of the technical assistance division ("TAD") and the enforcement division which will assign staff to the projects and dedicate division time to reviewing and meeting on regulatory proposals.

#### **A. CONTINUING PROJECTS (Carried over from 2006)**

**Item 1. Section 82015: Cosponsored Payments [CHANGE]:** Section 82015(a) of the Act defines a "contribution" as "a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes." Section 82015(b)(2) provides that a payment made at the behest of a candidate by a third party is a contribution to the candidate *unless* (among other exceptions) the payment is made principally for legislative, governmental, or charitable purposes. These payments are considered payments made for cosponsored events. However, these "cosponsored" payments must be reported within 30 days following the date on which the payment or payments equal or exceed \$5,000 in the aggregate from the same source in the same calendar year in which they are made.

Staff proposes to draft a form for reporting co-sponsored payments under section 82015(b)(2)(B)(iii). A regulation may be needed to specify the reporting requirements. Currently, the statute requires disclosure of every payment made by the co-sponsor once the \$5,000 threshold is met.

**RESOURCE ISSUES:** This item was set for prenotice discussion in November 2006 and adoption in February 2007. Staff is recommending moving the prenotice hearing to April and the adoption hearing to June, in order to accommodate more pressing projects in the early part of 2007. Although the resources were previously allocated to this project in 2006, those resources needed to be reallocated to other projects not initially placed on the 2006 calendar. This item has already been the subject of one interested persons meeting in 2006 and will be the subject of two Commission meetings in 2007 (April and June). Using the numbers presented in the strategic plan noted above, the legal division

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<sup>4</sup> Not reflected in this figure is the nonattorney time needed in connection with the legal division's regulatory program.

anticipates that at least 240 hours will be expended on this item (80 of which were attributed to the 2006 interested persons meeting).

**Item 2. Advertising Disclosure Cluster [DELETE]:** A primarily formed ballot measure committee must disclose its two highest donors. A variety of issues have arisen regarding the construction of these provisions. Staff proposed regulatory action to refine these provisions of the Act.

However, due to the circulation of the “Truth in Initiatives Act of 2006” for the November ballot, staff had deferred action on this project. The initiative required disclosure statements to appear on ballots, sample ballots, ballot pamphlets, designated web sites, *and in advertisements for and against ballot measures*. The “Truth in Initiatives Act” did not appear on the November ballot and therefore is no longer an impediment to Commission action.

**RESOURCE ISSUES:** This item has been removed from the regulatory calendar and shifted to the development of a legislative proposal. Staff anticipates significant work on this project in this legislative context possibly as high as 80 - 160 hours.

## **B. NEW PROJECTS: CAMPAIGN**

**Item 1. SB 145 (Stats. 2006, Ch. 624, urgency) Murray Political Reform Act of 1974: Contributions [NEW]:** This bill would authorize an elected state officer to accept contributions after the date of the election to the office presently held for the purpose of paying expenses associated with holding office or for any other purpose authorized by the Act, subject to certain limitations. The bill would set limits on the amount of contributions that may be made to an elected state officer in a calendar year and on the aggregate amount of contributions that a state officer may receive in a calendar year.

**RESOURCE ISSUES:** This bill is an urgency bill and therefore is currently in effect. This item has already been the subject of one interested persons meeting and will be the subject of an emergency adoption meeting and permanent adoption meeting in 2007. Using the numbers presented in the strategic plan noted above, the legal division anticipates that at least 240 hours will be expended on this item (80 of which were attributed to the 2006 interested persons meeting). Staff is proposing adoption of an emergency regulation in January, with final adoption tentatively set for the March Commission meeting, to address various issues raised by the bill.

**Item 2: AB 1759 (Stats. 2006, Ch. 438) Umberg Campaign Expenditures Disclosures [NEW]:** This bill would require committees other than primarily formed committees to disclose contributions or independent expenditures totaling \$5,000 or more to support or oppose the qualification or passage of a single state ballot measure within 10 business days of making the contribution or independent expenditure.

**Item 3: AB 2275 (Stats. 2006, Ch. 439) Umberg Political Reform Act of 1974: telephone advocacy [NEW]:** This bill requires candidates, committees, and slate mailer organizations that use campaign funds to make 500 or more phone calls in support or opposition of candidates or ballot measures to disclose the name of the organization that authorized or paid for the call unless the calls are personally made by the candidate, campaign manager, or volunteers. The bill also requires organizations to keep a script or a copy of the recorded phone call for a period of time per regulation 18401. The bill also prohibits committees from contracting with phone bank vendors who do not conform to these disclosure requirements.

**RESOURCE ISSUES:** Both of these bills become effective the first day of 2007. Staff has set regulations interpreting these bills for February prenotice and April adoption. These meeting dates were selected due to the smaller number of items currently set for those meetings. These items may also require an interested persons meeting before moving to prenotice, which would occur in December or January. Thus, the legal division anticipates that at least 240 hours will be expended on each item (480 staff hours combined). However, staff believes that these items are not ones that can be deferred since the regulated public must begin complying with the statutes on January 1, 2007.

**Item 4. Net Debt/Excessive Contribution Cluster [CHANGE]:**

**(a) Regulation 18531.61: Treatment of Debts Outstanding After an Election.** Section 85316 restricts a candidate for state elective office from accepting contributions after the date of an election except to pay net debts outstanding from the election. "Net debts outstanding" includes any costs associated with complying with the post-election requirements of the Act. However, neither section 85316 nor regulation 18531.61 mandate that funds permitted to be raised under the net debt rules are actually used to pay the debt. Staff will ask the Commission to consider a requirement that funds raised after an election can only be spent on net debt.

**(b) Return of Excess Contributions.** Sections 85301-85303 provide for contribution limits for state candidates. In addition, state candidates with no debt cannot accept contributions after an election under the provisions of section 85316. (See regulations 18531.6 and 18531.61.) For purposes of sections 85301-85303, regulation 18531 provides that where contributions either in the aggregate or on their face exceed the contribution limits, they will be deemed not accepted if returned, prior to deposit or negotiation, within 14 days of receipt. Similarly, for purposes of fundraising in violation of section 85316, where a committee has no net debt outstanding, regulation 18531.6(d)(3)(B) and 18531.61(d)(3)(B) provide, in relevant part: "Any contribution that exceeds the amount of net debts outstanding shall be treated in the same manner as a contribution in excess of the contribution limits."

When over-the-limit contributions are accepted, violations of sections 85301 - 85303 and 85316 would occur. In addition, regulation 18531 suggests that, in addition, a failure to return the contribution within 14 days is a separate violation of the Act.

However, it is unclear whether that would be a correct interpretation of current statutes. No specific provision of the Political Reform Act “requires” the return of contributions except for section 85700, which requires that contributions be returned to the donor where certain donor information is not provided.

**Proposal:** This regulatory proposal examines whether there is statutory authority to “require” contributions accepted inconsistent with regulation 18531 to be returned, or whether the regulation merely provides a method to avoid an initial violation under sections 85301-85303 and section 85316, under specified circumstances. Amendments to the regulations would more clearly provide for the applicable interpretation of the statutes. Other minor clarifying changes may also be made.

**RESOURCE ISSUES:** This cluster will require interested persons meetings in advance of the prenotice and adoption hearings. The legal division anticipates that at least 240 hours will be expended on this cluster (480 hours for both). Staff proposes retaining this project, but pushing the hearing dates on these items to later in the year -- by shifting each meeting one month. The proposed dates are: interested persons meetings in July, prenotice in September, and adoption in November.

#### **Item 5. Return of General Election Contributions (Section 85318)**

**[CHANGE]:** The Act establishes separate contribution limits for general and primary elections to the same office. The Act permits the acceptance of general election contributions even prior to the primary election for the same office. However, section 85318 provides, in pertinent part: “If the candidate for elective state office is defeated in the primary election ... the general election ... funds shall be refunded to the contributors on a pro rata basis *less any expenses* associated with the raising and administration of general election ... contributions.” (Emphasis added.) The statute provides no guidance as to how the expenses should be allocated (whether to the general election or primary). Staff has applied regulation 18540 by analogy. (*Boling* letter A-06-131.) Regulation 18540 was enacted to regulate the allocation of expenditures for purposes of the separate expenditure limits for general and primary elections. Section 85318 does not relate to the expenditure limits of the Act.

**Proposal:** *Either* add a cross-reference into regulation 18540 stating that candidates should also use regulation 18540 for allocating expenses under 85318, or, in the alternative, draft a new regulation which would address all the issues arising under section 85318.

**RESOURCE ISSUES:** Staff’s view at this time is that this item will not require an interested persons meeting in advance of the prenotice and adoption hearing. Thus, the legal division anticipates that only 160 hours will be expended on this item. An additional consideration is that this item was proposed as a result of several advice questions from the regulated public pertaining to the statute in question. Resolution of these questions before the 2008 election season would appear prudent. Staff proposes retaining this item, but pushing it to October (prenotice) and December (adoption).

**Item 6. General Purpose Committees (Section 82027.5) [CHANGE]:** Section 82027.5 provides:

“(b) A ‘state general purpose committee’ is a political party committee, as defined in Section 85205, or a committee to support or oppose candidates or measures voted on in a state election, or in more than one county.

“(c) A ‘county general purpose committee’ is a committee to support or oppose candidates or measures voted on in only one county, or in more than one jurisdiction within one county.

“(d) A ‘city general purpose committee’ is a committee to support or oppose candidates or measures voted on in only one city.”

**Proposal:** Enact a regulation to clarify under what circumstances a general purpose committee is considered a “state,” “county,” or “city” general purpose committee.

**RESOURCE ISSUES:** Staff’s view at this time is that this item will not require an interested persons meeting in advance of the prenotice and adoption hearing. Thus, the legal division anticipates that at least 160 hours will be expended on this item. With respect to the importance of the project, executive staff ranked this item as a one of three (i.e. high priority, must-have project). Staff proposes retaining this item, but pushing this item to a later date in the year -- prenotice in September, and adoption in November.

**Item 7. Retention of Campaign Records:** Section 84104 provides: “It shall be the duty of each candidate, treasurer, and elected officer to maintain detailed accounts, records, bills, and receipts necessary to prepare campaign statements, to establish that campaign statements were properly filed, and to otherwise comply with the provisions of this chapter. The detailed accounts, records, bills, and receipts shall be retained by the filer for a period specified by the commission.”

Regulation 18401(a)(4) clarifies that maintenance of documents for an expenditure of \$25 or more, or a series of payments for a single product or service which totals \$25 or more, consists of “cancelled checks, wire transfers, credit card charge slips, bills, receipts, invoices, statements, vouchers, and any other documents reflecting obligations incurred by the candidate, elected officer, campaign treasurer, or committee, and disbursements made from any checking or savings account, or any other campaign accounts, in any bank or other financial institution.”

However, many banks no longer return cancelled checks but rather allow access to facsimiles of the checks on the web or provide copies of checks only in response to customer requests. Neither of these would satisfy the regulation language.

**Proposal:** Allow retention of electronic copies of checks in lieu of cancelled checks.

**RESOURCE ISSUES:** Staff's view at this time is that this item will not require an interested persons meeting in advance of the prenotice and adoption hearing. Thus, the legal division anticipates that at least 160 hours will be expended on this item. This item was a new project and considered to be an important project by executive staff. However, unlike some of the other projects discussed above, this may be considered more a housekeeping project intended to keep the Act current with new technology. Staff proposes retaining this item.

**Item 8. Reports and Statements; Filing Dates (Regulation 18116):** Pursuant to regulation 18116, when a deadline for a statement or report falls on a Saturday, Sunday or official state holiday, the filing deadline shall be extended to the next regular business day. This extension does not apply to late contribution reports required by section 84203, late independent expenditure reports required by section 84204, or notice by the contributor of a late in-kind contribution required by section 84203.3.

**Proposal:** The Secretary of State's campaign reporting task force recommends that except for the weekend prior to an election, the "next business day" exception should apply to reports required to be filed within 24 hours, including late contribution/late independent expenditure reports, and election cycle reports required under sections 85309 and 85500.

**RESOURCE ISSUES:** Staff's view at this time is that this item will not require an interested persons meeting in advance of the prenotice and adoption hearing. Thus, the legal division anticipates that approximately 160 hours will be expended on this item. This item was considered a small project by executive staff when considering the amount of drafting and staff time, number of meetings, and potential for controversy. Thus, there is some possibility when staff gets into the project that they may find that only an adoption hearing is required, reducing the resources required for this project.

**Item 9. Making and Receipt of Contributions (Regulation 18421.1)**  
**[CHANGE]:** Section 82025 provides that an expenditure is made the earlier of: (a) when the payment is made, or (b) when the goods *or* services are received. However, independent expenditures are generally "made" when the communication is made. In cases where no communication is actually sent, the independent expenditure has not been "made" for reporting purposes.

**Proposal:** Define when an independent expenditure is "made" for purposes of the Act.

**RESOURCE ISSUES:** Staff's view at this time is that this item will not require an interested persons meeting. Thus, the legal division anticipates that 160 hours will be expended on this item. Staff proposes retaining this item, but advancing this item to an earlier date -- prenotice in June, and adoption in August.

**Item 10. Late Contribution Reports (Regulation 18425).** In response to a request for verbal advice, staff advised that a nonmonetary contribution (compensated services) was received, for purposes of the 24-hour reporting, on the date the individual's paycheck is normally issued, not every time the individual provides \$1,000 worth of services (potentially requiring a report every day during the 90-day cycle).

**Proposal:** Amend the regulation to allow estimated reports during the 90-day election cycle and to allow estimated reports of independent expenditures reported during the same period.

**RESOURCE ISSUES:** Staff's view at this time is that this item will not require an interested persons meeting. Thus, the legal division anticipates that approximately 160 hours will be expended on this item. This item was considered a medium-sized project by executive staff and with respect to the importance of the project, executive staff ranked this item as a two of three (i.e. medium priority, nice-to-have project). Staff proposes retaining this project.

**Item 11. Regulation 18402: Committee Names.** The Act's campaign disclosure provisions require, under certain circumstances, that committees adhere to naming conventions when naming their committees. Regulation 18402(c) provides:

"Whenever identification of a committee is required by law, the identification shall include the full name of the committee as required in the statement of organization.

"(1) In the case of a sponsored committee, the statement of organization shall include the name of the committee as provided in 2 Cal. Code Regs. section 18419.

"(2) For purposes of Government Code section 84504, in the case of a committee primarily formed to support or oppose a ballot measure, the committee name shall clearly identify the economic or other special interest of the committee's major donors of \$50,000 or more.

"(A) If candidates or their controlled committees, as a group or individually are major contributors of \$50,000 or more, the primarily formed committee name shall include the controlling candidate's name.

"(B) If the major donors of \$50,000 or more share a common employer, the identity of the employer shall also be disclosed in the name of the primarily formed committee."

For example, "[i]n the case of a sponsored committee, the name of the committee shall include the name of its sponsor." (Section 84102(a); see also regulation 18419(b)(1).)



**Proposal:** Amend the regulation to require that committees controlled by (or primarily formed to support/oppose) *a candidate* include the name of the candidate in the name of the committee.

**RESOURCE ISSUES:** Staff's view at this time is that this item will not require an interested persons meeting. Thus, the legal division anticipates that 160 hours will be expended on this item. Staff proposes retaining this project.

**Item 12(a): Pledges as Campaign Contributions [NEW]:** Under existing law, an enforceable written promise to contribute a specified sum of money is considered to be a contribution as of the date the promise is made, and is reportable in the same manner as any contribution of a like amount on the same date. However, regulation 18216 expressly excludes campaign pledges from classification as "enforceable" promises for timing and reporting purposes.

The Orange County Register, in an August 30, 2006 article, criticized the current definitions. The article, titled "Pledging muddles finance picture; Legislators accept promises instead of cash, confounding watchdogs who want to know who is trying to influence bills as the session winds down," suggests that pledges should be reportable, whether considered an enforceable promise or not. The Commission has decided to review this issue.

**RESOURCE ISSUES:** This item was proposed as a result of public comment concerning perceived abuse of contribution pledges. The Commission instructed staff to present an issues memorandum on this topic. Staff has proposed that the memorandum be presented in January. This would give the Commission the opportunity to discuss the matter further and determine whether further consideration of the issue is warranted.

**Item 12(b): Enforceable Promise to Make a Payment (Regulation 18216) [DELETE]:** Recently, staff was asked whether a donor could (by contract) promise to provide staff services to a committee and then whether the committee could then promise to contract for other goods or services for the same amount of money. If this were allowable, the requestor could avoid filing daily 90-day election cycle reports and could instead file one report disclosing the "enforceable promise."

**Proposal:** Amend 18216(b)(7) to clarify that the committee receiving the promise must contract for the goods or services the donor is promising to purchase.

**RESOURCE ISSUES:** If this item were to go forward, staff would anticipate skipping the interested persons meeting and going directly to the prenotice and adoption hearings. Thus, the legal division anticipates that 160 hours will be expended on this item. Because the issues raised in this project are unusual in nature and would not be likely to arise often, staff proposes **DELETING** this item from the calendar.

**Item 13. Filing Places; Candidates Holding One Office and Running for Another (Section 84215) [DELETE]:** Section 84215(d) requires county officeholders and candidates for county offices to file campaign statements in the county. Section 84215(e) requires city officeholders and candidates for city offices to file campaign statements in the city. The Commission has advised that an elected officeholder who runs for an office in a different jurisdiction must file all campaign statements required for both offices in both jurisdictions. (*Barrett Advice Letter*, No. A-88-150.) In other words, if an elected state officeholder controls two committees, one established for a state candidacy and one established for a local candidacy, both committees must file on the state filing schedule, as well as the local filing schedule and with all of the appropriate state and local filing officials.

**Proposal:** Codify *Barrett Advice Letter*, No. A-88-150, stating that candidates must file original reports where they hold office, as well as where they are seeking office.

**RESOURCE ISSUES:** If this item were to go forward, staff would anticipate only a prenotice and adoption hearing requiring approximately 160 hours in staff time. Staff views this project as a lower priority item and thus proposes **DELETING** this item from the calendar.

**Item 14: “Street Address” (Regulation 18421.2):** Regulation 18421.2 provides that the term “street address” for purposes of the campaign reporting rules means the street name, building number, and city, state, and zip code.” Contributions in the amount of \$100 or more shall be itemized on campaign statements. Many people on active duty in the military do not have a “street address,” as that term is defined. The only “address” available to these individuals may be the A.P.O. (Army and Air Force Post Office) or F.P.O. (Fleet Post Office (Navy)) address assigned by the military. As a result, a filer who receives contributions from military personnel may not be able to disclose the contribution as required by law.

**Proposal:** Regulation 18421.2 should be amended to include A.P.O. and F.P.O. addresses for military personnel. Other clarifying changes may also be made.

**RESOURCE ISSUES:** Staff’s view at this time is that this item will not require an interested persons meeting in advance of the prenotice and adoption hearing. Thus, the legal division anticipates that approximately 160 hours will be expended on this item. With respect to the importance of the project, executive staff ranked this item as a two of three (i.e. medium priority, nice-to-have project). Because staff is concerned that this problem may impact the ability of persons on active duty to make contributions in elections, staff believes the problem should be remedied as soon as practical. Staff proposes the item be retained.

**Item 15: Member Communications (Commissioner Huguenin’s Proposal)**  
**[NEW]:** Regulation 18215(c)(9) was last adopted in 1997, prior to the voters’ adoption of Proposition 34. It excludes from “contribution,” the cost of those internal or

membership communications constituting a “regularly published newsletter or periodical.” As part of the adoption of Proposition 34, section 85312 provides a new and statutory basis for the exclusion from “contribution” of internal or membership communications. By regulation, that exception has been construed to cover any newsletter, letter, flyer or like material, written or spoken. (Regulation 18531.7) This post-Proposition 34 exclusion is broader than the previous exclusion existing in regulation 18215(c)(9).

However, regulation 18531.7, in interpreting section 85312, provides at subdivision (a) that “payments for communications to members” includes both payments by the organization itself and payments by its sponsored committee for member communications. Commission consideration of regulation 18531.7 at several Commission meetings included discussion regarding the implications of section 85312 to ordinary reporting by recipient committees. Ultimately, the Commission decided that payments made by a recipient committee, which is already subject to the campaign reporting requirements of the Act, should continue to be reportable in accordance with the requirements of section 84211 despite the existence of section 85312 and regulation 18531.7. (See *Olson* Advice Letter, No. I-05-239, see attachment 3.) However, the narrower exception in regulation 18215(c)(9) may still apply.

**Proposal:** Incorporate into regulation 18215(c)(9), the broader concept of internal or membership communications from regulation 18531.7.

**RESOURCE ISSUES:** This item was proposed by Commissioner Huguenin. The Commission instructed staff to add this item to the regulatory calendar for 2007. Staff anticipates that this will be a big item, requiring an interested persons meeting in addition to prenotice and adoption hearings. Thus, the legal division anticipates that at least 240 hours will be expended on this item. The current plan is to hold the interested persons meeting in May, prenotice in July and adoption in September.

**Item 16: Commission Review of Advice Letters Nos. I-06-138 and I-06-071 or, as an Alternative to Further Informal Advice, Amendment of Regulation 18215(c)(16) and/or Consideration of Proposed Regulation 18530.10. (Chuck Bell Proposal.) [NEW]:** The advice letters at issue here (*Bell Advice Letters* Nos. I-06-138 and I-06-071) responded to inquiries from Charles H. Bell, Jr., regarding the circumstances in which a sponsor’s payments to a sponsored committee would be considered “contributions” to that committee, subject as such to the limits of section 85303(a). Specifically, Mr. Bell asked about the boundaries between payments “for the establishment and administration of a sponsored committee” – exempt from definition as contributions under regulation 18215(c)(16) – versus payments made to support committee fundraising activities. The latter payments are not exempt from the definition of “contribution” because they have not been regarded as costs of “establishment or administration” under regulation 18215(c)(16).

As noted in the first advice letter (No. I-06-071), when regulation 18215(c)(16) was originally before the Commission for adoption, Mr. Bell proposed a draft amendment specifically exempting from the Act's definition of "contribution" the sponsor's payments of a sponsored committee's fundraising costs. The Commission declined to insert such an exemption in the language of regulation 18215(c)(16) in December 1996 and again in January 1997.

In his more recent requests, Mr. Bell urged staff to read into regulation 18215(c)(16) and section 85303(a) a distinction between "direct" and "indirect" payments to a committee which, as a practical matter, would define payments made "for the purpose of making contributions to candidates for elective state office," which are limited by section 85303(a).

**RESOURCE ISSUES:** The Commission instructed staff to add this item to the regulatory calendar for 2007. Staff anticipates that this will be a big item, requiring an interested persons meeting in addition to prenotice and adoption hearings. Thus, the legal division anticipates that at least 240 hours will be expended on this item. The current plan is to hold the interested persons meeting in June, prenotice in August and adoption in October.

## **C. CONFLICT OF INTEREST DISQUALIFICATION AND DISCLOSURE**

### **Item 1. Disclosure Cluster**

**a. Regulation 18740 (Privilege):** Regulation 18740 is entitled "Privileged Information: Statement of Economic Interests." Notwithstanding its broad description, this regulation is very narrowly drafted, permitting an official to omit from his or her Form 700 only "the name of a person who paid fees or made payments to a business entity if disclosure of the person's name would violate a legally recognized privilege under California law."

There have been occasions over the years where staff has found that disclosure of the location of real property owned by a public official would create physical danger, and yet on these occasions the officials could not utilize regulation 18740. For example, one situation involved a judge who, due to credible threats of retaliation by members of criminal gangs, wished to avoid disclosure of his interest in a residence occupied by his parents.

More recently, we were contacted by a newly-elected planning commissioner who had for many years run a domestic violence shelter and two "safe houses" whose locations were kept confidential to protect victims of domestic violence. Penal Code § 273.7 makes it a misdemeanor to maliciously publish or disclose the location of such a "safe house," yet, a literal interpretation of the Act required disclosure.

**Proposal:** Regulation 18740 should be amended to allow an exemption from disclosure of real property locations when such disclosure presents a credible threat of physical violence, whether to the official or to other persons at the location. Depending upon research into the practical problems encountered by public officials, the regulation might be limited to certain kinds of officials, such as judicial officers, law enforcement personnel, and the owners of domestic violence shelters, or it could be more broadly drafted as authority for a general “physical threat” exemption.

**b. Parcel Disclosure:** Regulation 18730 governs the provisions of the conflict of interest codes, including the manner of reporting economic interests on a Statement of Economic Interests (Form 700). Specifically, regulation 18730(b)(7)(A)(3) governs the manner of reporting real property interests and allows the address *or other precise location of the real property* to be disclosed on the Form 700. This provision has been construed to allow reporting an assessor’s parcel number instead of a street address.

Generally, the real property disclosure requirement is meant to provide the public with the exact location of the filer’s real property interests as a means to determine whether the filer may have a conflict of interest in making a particular governmental decision related to the property. While disclosure of an assessor’s parcel number technically reveals the precise location of a property, a parcel number listed on Form 700 could instead be used as a means of concealing the property’s location from members of the public who do not have the knowledge or means to take the steps necessary to determine the location of the property. This could easily thwart the intended purpose of the disclosure requirement.

The problem with using a parcel number of a property instead of a street address is that it can make it very difficult for the public to clearly identify the location of the property. A member of the public would have to go to the County Assessor’s office to look up the parcel number in order to determine the exact location of the property when a quick look at a street address reported on the Form 700, if one existed, would have provided the desired information. The need to go to this length to determine the location of a property, when a street address is available, would obviate the purpose of the disclosure requirement.

Filers choose to report the parcel number for safety reasons (see discussion of regulation 18740, above), but the issue of safety is being dealt with in other ways, such as by the Act’s exemption for the disclosure of personal residences, and the proposed amendment to 18740 which would deal with danger to the official’s immediate family or others.

**Proposal:** The enforcement division staff therefore proposes an amendment to regulation 18730(b)(7)(A)(3) to clarify that the property address of a filer’s real property interest must be disclosed, if one exists. If there is no street address, another method which accurately reflects the precise location of the real property will suffice. Thus, an alternate method indicating the precise location of the property could be used only when a street address is not available. This change will allow for full disclosure of real property

interests and will provide meaningful disclosure of those interests to the members of the public. This change will also allow decisions made, participated in, or influenced by a public official, which are related to his or her property interests, to be more easily identified.

**RESOURCE ISSUES:** This cluster would be considered a big project, and staff anticipates that it will require an interested persons meeting in advance of the prenotice and adoption hearing. Thus, the legal division anticipates that at least 240 hours (or 480 for both aspects of the cluster) will be expended on this cluster. Staff believes that the regulation 18740 issue should be resolved as soon as possible and thus proposes the cluster be retained on the calendar.

**Item 2. Gifts to an Agency (Regulation 18944.2):** A payment is deemed to be a gift to a public agency, not a gift to a public official, if all of the following requirements are met:

- (1) *The agency receives and controls the payment.*
- (2) The payment is used for official agency business.
- (3) The agency, in its sole discretion, determines the specific official or officials who shall use the payment.
- (4) The agency memorializes the payment in a written public record.

**Proposal:** Staff proposes amending regulation 18944.2(a)(1) to allow the donor to make payments directly to an airline or hotel rather than requiring that the agency receive the payment. In cases where the latter three factors are not in dispute (i.e., the trip is for agency business, the agency selects the employee to go and memorializes all of these steps in a public record), the payment may still be a gift to the assigned public employee where the donor chooses to pay a bill directly (to a hotel or for plane tickets). Staff would like to explore modification or elimination of the first factor.

**RESOURCE ISSUES:** At the October Commission meeting, the Commission suggested this was one item that may be deleted in order to free up resources for the new projects that were being added. After consultation with TAD, staff proposes keeping this item on the calendar. While originally considered a lower priority by executive staff, staff now believes that the frequency with which TAD receives questions about this specific provision of this regulation militate in favor of retaining this item. If the Commission agrees, this item would be set for a prenotice and adoption hearing, but no interested persons meeting. The legal division anticipates that 160 hours will be expended on this item.

**Item 3. Gifts of Travel (Section 89506) [DELETE]:** The vast majority of travel payments to a public official from a third party are classified as gifts under the Act. In

some cases the payment may be considered income. In either case, the official must disclose the amounts on his or her annual Statement of Economic Interests (Form 700). However, various exceptions to the gift limit may apply if the official travels to give a speech or travels on behalf of a government agency or nonprofit organization for a governmental purpose.

An official's necessary lodging and "subsistence," including meals and beverages, provided directly in connection with an event at which the official gives a speech or participates in a panel or seminar are neither subject to gift limits nor reportable. (Regulation 18950.3.) Payments that qualify under this regulation are not subject to gift limits and are not reportable on your Statement of Economic Interests. "Meals and beverages, provided directly in connection with an event" which qualify under this exception have been construed to be limited to those provided on the day of the speech. What constitutes "necessary accommodations" within this exception are generally limited to the day of the speech, but may include the day before or after if necessary due to travel arrangements.

In contrast, where the travel is in connection with a speech given by the filer and is reasonably related to a legislative or governmental purpose or a public policy issue, and the travel is within the United States, related lodging and subsistence expenses on the day preceding the speech, the day of the speech, and the day after it are not limited. (Reg. 18950.1(a).) These payments are not limited, but they are reportable (unless covered by regulation 18950.3) and may give rise to disqualification.

**Proposal:** The different rules regarding travel and lodging and subsistence in connection with a speech have proven to be confusing to filers. Staff will propose amending the gift and honoraria regulations to make them more consistent with section 89506.

**RESOURCE ISSUES:** At the October Commission meeting, the Commission recommended **DELETING** this project. Staff concurs. In contrast to the prior item, this item is currently less problematic and more of a housekeeping matter. While the rules in question appear inconsistent and confusing, staff has been able to effectively advise the public regarding the two rules. In addition, the rules are described and further clarified in the Commission's fact sheets available on the Commission website. If this item were to go forward, it would have been set for three meetings, requiring approximately 240 hours of legal attorney staff time.

**Item 4. Regulation 18705.1 Materiality Standard [NEW]:** Regulation 18705.1 sets forth the materiality standard for business entities in which a public official has an economic interest for purposes of determining whether there is a conflict of interest in a governmental decision. For business entities that are *indirectly* involved in governmental decisions, regulation 18705.1(c)(2) sets forth the relevant materiality standards with reference to the New York Stock Exchange ("NYSE") listing requirement. That requirement was previously based on a company's earnings for its most recent fiscal year.

Since the adoption of this regulation, the NYSE has changed its listing requirements, creating confusion as to what standard to apply.

A proposed technical amendment was presented to the Commission in October which would have mirrored the new listing requirements as set forth in the NYSE Listed Company Manual. However, the Commission asked staff to set this item as a regulation project for 2007 in hopes of fully investigating whether the NYSE standard is the preferred standard or whether a new, easier standard for the regulation should be developed.

**RESOURCE ISSUES:** The Commission instructed staff to add this item to the regulatory calendar for 2007. Staff anticipates that this will be a big item, requiring an interested persons meeting in addition to prenotice and adoption hearings. Thus, the legal division anticipates that at least 240 hours will be expended on this item. The current plan is to hold the interested persons meeting in March, prenotice in May and adoption in July.



**D. MISCELLANEOUS ITEMS:**

**Item 1. Diversion Program:** Commission consideration whether a diversion program is desired to funnel certain violations out of the Administrative Hearing Process. At the May 11, 2006, Commission meeting, the Commission discussed the concept of a Diversion Program as an alternative to administrative prosecution of minor violations of the Act. In response to the Commission's discussions, staff will present recommendations to the Commission regarding the regulatory implementation of a diversion program, its substantive scope and eligibility for participation in it, the basic procedural terms of a program, the effect of participation in a program, training options under the program, and funding for a program. Future regulatory action may be needed.

**RESOURCE ISSUES:** Staff anticipates that this will be a medium-sized item, requiring only prenotice and adoption hearings. Thus, the legal division anticipates that at least 160 hours will be expended on this item, if the Commission decides to move forward on it.

**Item 2. Annual Technical Clean-Up:** The Commission considers annually changes to Commission regulations that resulted from the staff's review for technical and other minor changes.

**RESOURCE ISSUES:** The legal division anticipates that this will be a one-meeting item going straight to adoption. Thus, the legal division anticipates that 80 hours of attorney time will be expended on this item.<sup>5</sup>

**Item 3. Quarterly Review of Work Plan and Plan Updates/2008 Regulation Calendar:**

**RESOURCE ISSUES:** This administrative function absorbs approximately 10 hours per meeting during the course of the year for three updates and 60 hours a meeting (generally October and December) for the proposed regulation calendar for the following year (2008). Legal division estimates that 150 hours in total dedicated to this matter.

**E. CONCLUSION/OVERALL RESOURCES:**

The legal division resources currently include 10 attorneys (two supervisory), an increase of 1.5 positions from prior years. Attorney resources in the division are generally allocated as follows:

- Litigation - 1.5 attorneys, an increase of .5 personnel from prior years
- Advice Letters - 3.5 attorneys, an increase of .5 personnel from prior years
- Legislation - .5 attorney, no change

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<sup>5</sup> In addition, another 80 hours of nonattorney time (in addition to clerical time) will be allocated to this project by the regulations coordinator, who collects the technical packet proposals.

- Regulations - 2.5 attorneys, an increase of .5 personnel from prior years
- Review of Forms/Manuals - .5 attorneys, no change
- In-house counsel - .5 attorneys, no change
- Misc. legal work - .5 attorneys, no change
- Management/Supervision - .5 attorneys, no change.

If the Commission approves this regulatory packet, with the proposed deletions, we anticipate allocating 4,550 staff hours to the Commission regulatory function this calendar year. If we assume 1,920 hours equates to the annual hours of one legal division attorney, the 4,550 equate to approximately 2 and 1/3 attorneys. Clerical support for this function amounts to almost one position (1/3 of resources allocated for attorney work) This would be right in line with our workload estimates.

**Overall Recommendation:** Staff recommends that the Commission adopt the work plan as proposed with the deletion of the following:

- Item A2. Advertising Disclosure Cluster
- Item B12(b). Enforceable Promise to Make a Payment (Regulation 18216)
- Item B13. Filing Places; Candidates Holding One Office and Running for Another (Section 84215)
- Item C3. Gifts of Travel (Section 89506).